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Acting United States Trustee for Region 3¹

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

PG&E CORPORATION,

- and -

PACIFIC GAS AND ELECTRIC COMPANY,

Debtors.

- Affects PG&E Corporation
- Affects Pacific Gas and Electric Company
- Affects both Debtors

** All papers shall be filed in the lead case,
No. 19-30088 (DM)*

Bankruptcy Case
No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

Date: May 8, 2019

Time: 9:30 a.m. (Pacific Time)

Place: Hon. Dennis Montali
450 Golden Gate Avenue
16th Floor, Courtroom 17
San Francisco, CA 94102

**UNITED STATES TRUSTEE'S OBJECTION TO MOTION
BY TURN FOR APPOINTMENT OF COMMITTEE OF RATEPAYER CLAIMANTS
PURSUANT TO 11 U.S.C. §§ 1102(A)(2) AND 105**

Andrew R. Vara, Acting United States Trustee for Region 3 (the “United States Trustee”), by and through his undersigned counsel, hereby files this objection (“Objection”) to the Motion of The Utility Reform Network (“TURN”) for Appointment of Official Committee of Ratepayer

¹Andrew R. Vara, Acting United States Trustee for Region 3, is acting in this appointment for Tracy Hope Davis, United States Trustee for Region 17, who has recused herself.

1 Claimants Pursuant to 11 U.S.C. §§ 1102(a)(2) and 105(a) (ECF No. 1324, “Motion”).² This
2 Objection is supported by the following memorandum of points and authorities and any argument
3 the Court may permit.

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5 **I. MEMORANDUM OF POINTS AND AUTHORITIES**

6 **A. Introduction**

7 Despite the fact that this Court has previously held, in a case involving the same entity, that
8 “[t]here is no authority for creation of the Ratepayers Committee,” the Motion requests the Court
9 direct the United States Trustee to appoint an official committee of ratepayer claimants. The
10 United States Trustee understands the importance of these proceedings to the many affected
11 parties, including ratepayers. That does not, however, establish a legal entitlement for any group
12 of interested parties to be represented by an official committee under section 1102(a)(2). TURN’s
13 attempt to distinguish the earlier PG&E case with this one and to establish that, this time, the
14 ratepayers are actually “creditors” fails, and the Motion must therefore be denied. In the
15 alternative, TURN has failed to show that the ratepayers are not adequately represented.
16 Moreover, the ratepayers enjoy certain protections with regard to rate increases under section
17 1129(a)(6).

18 **B. Background Facts and Procedural Posture**

19 1. On January 29, 2019, the Debtors commenced the above-captioned cases by filing
20 voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. ECF No. 1.

21 2. No trustee has been appointed in the Debtors’ cases. *See generally* Case Dockets.

22 3. On February 12, 2019, the United States Trustee appointed an Official Committee
23 of Unsecured Creditors (“OCC”). ECF No. 409. On February 15, 2019, the United States Trustee
24 appointed an Official Committee of Tort Claimants. ECF No. 453.

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26 ² The United States Trustee requests that the Court take judicial notice of the pleadings and
27 documents filed in these cases pursuant to Federal Rule of Bankruptcy Procedure 9017 and Federal
28 Rule of Evidence 201.

1 4. By letter dated February 6, 2019, TURN requested the United States Trustee
2 appoint an official committee of ratepayer claimants. *See* ECF No. 1327. After review and
3 analysis, the United States Trustee responded that he had concluded that appointment of such a
4 committee would be outside the United States Trustee's statutory authority. ECF No. 1327-1.
5 Specifically, the United States Trustee stated that "Section 1102(b)(1) requires that the United
6 States Trustee appoint persons who hold claims against the debtor to serve on official committees.
7 To be eligible for appointment, prospective members must qualify under the Bankruptcy Code as
8 'persons' and must 'hold claims against the debtor.' See 11 U.S.C. §§ 101(10) and (41)." *Id.*

9 5. TURN again requested the United States Trustee form a ratepayers committee, and
10 by letter dated March 21, 2019, the United States Trustee once again declined, indicating that his
11 position remained the same and that, accordingly, no action would be taken. ECF No. 1327-2.

12 6. TURN filed the Motion on April 10, 2019. ECF No. 1324.

13 7. The Motion requests "the Court for an order pursuant to 11 U.S.C. §§ 1102(a)(2)
14 and 105(a) directing the United States Trustee to appoint an official committee of ratepayer
15 claimants." *Id.* According to the Motion, "the U.S. Trustee has failed to follow controlling law,
16 refusing to appoint a committee on the ground that ratepayers are not persons with pre-petition
17 claims against the debtors herein." *Id.*³

18 8. Certain other parties filed joinders to TURN's motion, each expressing a
19 willingness to serve on an official committee of ratepayer claimants. ECF No. 1476, 1477.

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25 ³ To be clear, the United States Trustee never based the denial of the committee request on a
26 conclusion that ratepayers are not "persons." Although most governmental ratepayers would not
27 be "persons" under 11 U.S.C. § 101(41), most private ratepayers are persons. But "personhood"
28 does not by itself entitle one to be represented by an official committee. The person must be either
a creditor or an equity security holder. The United States Trustee concluded that the ratepayers are
not creditors.

OBJECTION

I. The Statutory Framework: Section 1102 Confers Important, but Different, Authority on Bankruptcy Courts and U.S. Trustees with Respect to Official Committees.

Section 1102(a) of the Code governs the formation, appointment, and modification of official committees of creditors and equity security holders. It provides under what circumstances the court and the United States Trustee may act and under what standard. Congress gave the United States Trustee and bankruptcy courts important, but divergent, authority with respect to committees in chapter 11. As to the United States Trustee's role (outside of North Carolina and Alabama), the United States Trustee appoints all official committees and, as appropriate, monitors membership and occasionally modifies their composition. 11 U.S.C. § 1102(a)(1) and (2).

Section 1102 also confers important, but different, authority on bankruptcy courts with respect to official committees. A court's authority over committee formation and membership is limited. A court may, if requested:

- order the United States Trustee to appoint additional committees if necessary to assure adequate representation;
- order the United States Trustee to change committee membership if necessary to ensure adequate representation;
- order that a committee not be appointed in a small business case; or
- order the United States Trustee to increase membership to include a creditor that is a small business concern.

11 U.S.C. § 1102(a)(1)-(4). “Those are the only powers over committees the Code gives the court. There are no others.” *In re Caesars Entertainment Operating Co.*, 526 B.R. 265, 268 (Bankr. N.D. Ill. 2015).

1 **II. As This Court Has Previously Held, There is No Authority in the Bankruptcy Code**
2 **for the Appointment of a Ratepayers Committee Because Ratepayers Are Not**
3 **Creditors.**

4 TURN cannot obtain the relief it seeks because such a committee can represent only
5 creditors or equity security holders. As this Court has specifically ruled, ratepayers — customers
6 of PG&E who pay money to the entity for gas and electrical services — are not creditors. *See In*
7 *re Pacific Gas & Electric Co.*, Case No. 01-30923, Memorandum of Decision Regarding Motion
8 for Order Vacating Appointment by U.S. Trustee of Official Comm. of Ratepayers (Bankr. N.D.
9 Cal. May 18, 2001, ECF No. 599 at 8) (finding that “having an interest in a particular result (as all
10 ratepayers do) does not rise to the level of having a claim as defined in the Bankruptcy Code”).
11 The Court noted that section 1102 of Bankruptcy Code authorizes the appointment of one
12 creditors’ committee and additional creditors’ committees “if necessary to assure adequate
13 representation of creditors,” (*i.e.*, holders of prepetition claims). *Id.* at 5. The Court also noted
14 that “ratepayers have other means and other fora to protect their interests,” such as the Official
15 Committee of Unsecured Creditors and the Attorney General’s Office. *Id.* at 2.

16 TURN’s attempt to distinguish current ratepayers from ratepayers during the prior case
17 fails. TURN argues that because PG&E customers are entitled to receive a small credit on their
18 bills twice a year, “[e]very ratepayer within PG&E’s service area is a creditor in these cases.”
19 ECF No. 1324 at 8-9. While TURN is correct that 11 U.S.C. § 101(5)(A) defines “claim” as a
20 “right to payment,” ratepayers do not have a right to payment. In fact, the Public Utilities
21 Commission of the State of California specifically rejected the idea of paying customers directly
22 via an off-bill rebate check in favor of an on-bill credit. ECF No. 1326-1 at 121. All current
23 customers receive the small credit in April and October, *id.* at 122, a minor, automatic⁴ statement
24 adjustment that does not rise to the level of transforming all gas and electric customers into
25 creditors of PG&E. The adjustment is simply a reduction in the amounts owed by ratepayers that
26 is reflected on their April and October statements.

27 ⁴ Contrary to what TURN argues, ratepayers do not, in fact need a committee to “ensur[e] their
28 claims are paid as and when due” The rebates are provided automatically every six months.
ECF No. 1326-41 at 124.

1 Finally, even if ratepayers may end up partially funding (directly or indirectly) a plan of
2 reorganization proposed by the Debtors, there simply is no debtor-creditor relationship between
3 PG&E and its customers that would give rise to creditor status. TURN's argument proves too
4 much. Almost every operating chapter 11 debtor will have key customers who purchase its
5 products or services. The maintenance of relationships with those customers will likely be vitally
6 important to the successful rehabilitation of the debtor. Indeed, the proceeds of the customers'
7 purchases of products or services will, at least to some degree, fund the plan. But the customers
8 are not creditors of the debtor. To the contrary, they are more likely to be obligors to the debtor.⁵
9 The Bankruptcy Code definition of "creditor" simply cannot bear the weight of TURN's expansive
10 interpretation. Because TURN seeks the appointment of a committee of interested parties who are
11 not creditors, the Motion should be denied.

12 **III. Even if this Court Were to Find that the Ratepayers are Creditors, an Additional
13 Committee is Not Warranted.**

14 "The party moving for an order directing the appointment of an additional committee has
15 the burden of establishing that it is not adequately represented." *In re Nat'l R.V. Holdings, Inc.*,
16 390 B.R. 690, 695 (Bankr. CD Cal. 2008); *In re Residential Capital, LLC*, 480 B.R.550, 557
17 (Bankr. SDNY 2012). Even if the ratepayers are somehow able to establish that they have a "right
18 to payment" or that PG&E owes a "debt" to them, they must further show that the ratepayers are
19 not adequately represented. TURN cannot meet this burden, because "the requirement that the
20 moving party show that such a committee is 'necessary to assure adequate representation' has been
21 described as ranging from a 'high standard' to requiring a showing that an additional committee is
22 'absolutely required,' 'essential,' or 'indispensable.'" *In re Residential Capital, LLC*, 480 B.R. at
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27 ⁵ Similarly, ratepayers are not "involuntary creditors" merely because their money may be used to
28 fund a chapter 11 plan in the future.

1 558 (internal cites omitted). The remedy TURN seeks is “extraordinary,” and not supported by
2 the facts and circumstances of the case. *In re Nat'l R.V. Holdings, Inc.*, 390 B.R. at 695.

3 On February 12, 2019, the United States Trustee appointed the OCC. ECF No. 409. The
4 OCC is composed of a broad and diverse group of legitimate unsecured creditors, including, as
5 noted by TURN, “a Fortune 200 energy generator, an integrated security company specializing in
6 the provision of security and related services, two bond indenture trustees, and one of the unions
7 for PG&E employees.” ECF No. 1324 at 9. The OCC, the committee already in place, is the
8 voice for all unsecured creditors in these bankruptcy cases. *See In re SPM Mfg. Corp.*, 984 F.2d
9 1305, 1315 (1st Cir. 1993) (finding that “a creditors’ committee and its members must act in
10 accordance with the provisions of the Bankruptcy Code” and that “the committee is a fiduciary for
11 those whom it represents, not for the debtor or the estate generally”). Any argument by TURN
12 that the OCC is not or cannot adequately represent all unsecured creditors is unsupported and
13 without merit. If ratepayers are somehow found to be “creditors,” their interests as creditors are
14 represented by the OCC; if ratepayers are not creditors, they do not belong on any official
15 committee at all.⁶

16 One additional consideration should bear on the entitlement of ratepayers to an additional
17 official committee. TURN is not actually seeking protection for the ratepayers’ interests *as*
18 *creditors*. Instead, it appears that TURN seeks to use this hypothetical creditor status to obtain an
19 official committee to represent the ratepayers’ overall concerns in these cases. Although those
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26 ⁶ TURN suggests individuals from numerous entities that it believes should be appointed to a
27 ratepayers’ committee, ECF No. 1324 at 1-2, though in the event the Court orders the formation of
28 such an additional committee, any members would be selected by the United States Trustee. *See* 11
U.S.C. § 1102(a)(2).

1 concerns are undoubtedly important and deserve due consideration, the Code remedy of an official
2 committee is not available to represent the ratepayers' non-creditor interests in the cases.

3 Furthermore, it bears noting that the ratepayers have other options available to them to
4 protect their interests. Bankruptcy Rule 2018(b) permits the Attorney General of the State of
5 California to appear and be heard on behalf of consumer creditors as long as the court determines
6 that the appearance is in the public interest. And section 1109(b) gives a "party in interest,"
7 including various enumerated entities, the right to appear and be heard on any issue in a case. *See*
8 *In re Pacific Gas & Electric Co.*, Case No. 01-30923, ECF No. 599 (discussing Rule 2018(b) and
9 section 1109(b)).

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11 **IV. Ratepayers Are Protected by 11 U.S.C. § 1129(a)(6) Because Any Potential Rate
12 Change Would Need to Be Approved By the Regulatory Commission.**

13 Section 1129(a)(6) states that a court may only confirm a plan if "[a]ny regulatory
14 commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has
15 approved any rate change provided for in the plan, or such rate change is expressly conditioned on
16 such approval." *See, e.g., In re Cajun Elec. Power Co-op., Inc.*, 230 B.R. 715, 741 (Bankr. M.D.
17 La. 1999) (finding that proposed plan satisfied section 1129(a)(6) where it provided that debtor
18 would "seek all necessary approval" for any rate change).

19 So, while TURN argues that a "separate committee is required to allow the millions of
20 ratepayers affected by these cases to speak with a single voice . . .," ECF No. 1324 at 10, no plan
21 can be confirmed that does not comply with section 1129(a)(6). Therefore, if any future plan
22 included a rate change, PG&E would first have to have full approval from the California Public
23 Utilities Commission, and any ratepayer or entity would have the opportunity to be heard by the
24 regulatory agency during any such consideration. Or, put another way, section 1129(a)(6)
25 specifically allows for a rate change subject to regulatory commission approval. *See In re Pacific*
26 *Gas and Electric Co.*, 304 B.R. 395, 410 (Bankr. N.D. Cal. 2004) (finding that "[s]ection
27 1129(a)(6) specifically allows confirmation of a plan containing a rate change as long as the rate
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1 change is approved by the commission having jurisdiction over those rates"). Therefore, the
2 primary concern of the movants here is better and more appropriately addressed during plan
3 formulation and confirmation, not by forming another committee in a case where unsecured
4 creditors are already adequately represented.

5 **CONCLUSION**
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7 **WHEREFORE**, the United States Trustee requests the Court deny the Motion.
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9 Dated: April 24, 2019

10 Andrew R. Vara
11 Acting United States Trustee, Region 3
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13 By: /s/ Cameron M. Gulden
14 CAMERON M. GULDEN
15 Trial Attorney
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